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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-1245**

LIBERTY MUTUAL INSURANCE COMPANY, A Corporation,

*Petitioner,*

—v.—

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL EDUCATION ASSOCIATION

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## BRIEF *AMICI CURIAE*

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### Interest of *Amici*[1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, public and private, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination.

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[1] This brief is filed with consent of the parties. The letters of consent for the American Civil Liberties Union are filed herewith. The letters of consent for the National Education Association will be filed separately.

The American Civil Liberties Union believes that this case, concerning the Title VII rights of work force members disabled due to pregnancy, poses an issue of great significance to the achievement of full equality between the sexes.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. We acted as *amicus curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), which declared inconsistent with due process forced termination of a teacher's employment at a fixed stage of pregnancy, and *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), which upheld, against an equal protection challenge, the exclusion of women disabled by childbirth from a state-operated social insurance program. Lawyers for the American Civil Liberties Union were counsel for the Petitioner in *Struck* v. *Secretary of Defense,* 461 F. 2d 1372 (9th Cir. 1971, 1972), *cert. granted,* 409 U.S. 947, *judgment vacated and case remanded for consideration of mootness,* 409 U.S. 1071 (1972), which challenged the Air Force discharge of Captain Struck for pregnancy.

With regard to sex-based discrimination generally, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971), participated as counsel for the appellants and later as *amicus curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), represented the appellant in *Kahn* v. *Shevin,* 416 U.S. 351 (1974), and the appellees in *Edwards* v. *Healy,* 95 S. Ct. 2410 (1975), and *Weinberger* v. *Wiesenfeld,* 95 S. Ct. 1223 (1975).



The National Education Association (NEA) is a non-profit corporation founded in 1857 and chartered by an act of Congress in 1906. NEA is an independent, voluntary organization of educators consisting of 1.7 million members. It is the largest professional organization in the nation. NEA has long been concerned with the elimination of discrimination on the basis of sex in education and employment. It has provided financial support to many teachers in litigation, brought under federal statutes and constitutional provisions, contesting pregnancy-based distinctions and filed an *amicus curiae* brief with this Court in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), which presented the issue of the constitutionality of a school board's mandatory maternity leave rule.

## Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, affirming a judgment declaring violative of Title VII Petitioner-employer's exclusion of pregnancy-related disability from its disability income protection plan, is reported at 511 F. 2d 199 (1975). The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F. Supp. 1146 (1974) and its memorandum order denying Petitioner's motion for reconsideration is reported at 372 F. Supp. 1163 (1974). Copies of these opinions are set out in the appendix to the petition for a writ of certiorari at pages 2-18, 19-48, and 49-51 respectively.

## Statute Involved

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provides:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

## Question Presented

Whether the denial of insurance benefits to the class of women workers disabled by pregnancy, childbirth and related conditions under a comprehensive disability income protection plan violates Title VII.



## Statement of the Case

Respondents Sandra Wetzel and Mari Ross commenced this class action under Title VII of the 1964 Civil Rights Act on February 28, 1972. They sought relief against Petitioner Liberty Mutual Insurance Company's policies providing that women workers disabled by pregnancy, childbirth and related conditions were not entitled to benefits under the company's disability income protection plan and that such women, unlike other disabled workers, would be fired if they failed to return to work within a specified time period. In the same action, Wetzel and Ross attacked as sex discriminatory the company's recruitment, hiring, promotion and pay policies. They charged that the company sex-segregated both entry-level jobs and promotion lines in its Claims Department, to the marked economic disadvantage of its women workers. As to all these charges, except for the as yet unresolved pay issue, the company was found to have discriminated against its women workers in violation of Title VII. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3644 (U.S. June 9, 1975).

The company's policies relating to pregnancy, like its sex-segregation policies, deprived women employees of both work and money. Until September, 1970, more than six years after passage of Title VII, Liberty Mutual fired pregnant women. In that year, it changed the policy to allow pregnant women a choice between being fired or taking an unpaid leave of absence at the end of the eighth month, returning to work within six months of the leave date or three months of the delivery date, whichever came first. Liberty Mutual further amended the policy in November, 1971, to

allow pregnant women to remain on the job for as long as they were physically able to perform the work. However, it continued to fire women if they did not return to work within the specified time period, even if they remained disabled. This automatic firing provision does not apply to employees disabled for any other reason. The company asserted its right to retain this latter policy through its appeal to the Third Circuit, but has abandoned that argument before this Court.

Liberty Mutual maintains a comprehensive disability income protection plan providing a percentage of salary to disabled workers while they are disabled. The plan covers virtually all disabilities except those caused by pregnancy, childbirth and related conditions. Disabled male workers receive income protection for every disability caused by conditions unique to the male sex, such as cancer of the prostate gland and vasectomies.

The basic eligibility test under Liberty Mutual's disability income protection plan is whether the disability requires "throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures." Petitioner's Brief, A3. Women disabled by pregnancy and related conditions plainly meet this test. To remove them from coverage, the plan therefore adds a specific exclusion for "disability due to pregnancy or any cause related to pregnancy." Petitioner's Brief, A3. The only other disabled workers excluded by categories based on the source of the disability are those whose disability stems from "any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury," Petitioner's Brief, A3; all of these apply



to both men and women. None of these disabilities disproportionately affects men workers, as Petitioner suggests at 19-20 of its Brief. Acts of war affecting Liberty Mutual employees while they are employees, such as a nuclear bombing, would injure both men and women workers equally. Suicides, the subject of the statistics cited by Petitioner (as opposed to *attempted* suicides, whose disabilities are excluded under the plan), would not receive any income protection at all, being dead.

Liberty Mutual also suggests that its plan excludes workers disabled by alcoholism, narcotics addiction, or mental or emotional disorder, Petitioner's Brief, 20, but a careful reading of its plan reveals that this is not so. Instead, a worker disabled by these conditions has the option whether to receive insurance benefits, since he or she can do so simply by enrolling "in a corrective program under the guidance of a licensed physician." Petitioner's Brief, A3.

Time limits applicable to coverage apply equally to all disabilities. Any disabled employee must wait until the eighth day of disability for coverage to start; coverage lasts for 103 weeks for an employee who has worked for Liberty Mutual less than five years; thereafter he or she is covered until age 65.

The District Court, granting partial summary judgment to Respondents, determined that Liberty Mutual's employment policies relating to pregnancy violated Title VII. Liberty Mutual's motion for reconsideration was denied, in part because the company offered no evidence on the cost of extending disability benefits to pregnancy-related disabilities. 372 F. Supp. at 1164. Nor had Liberty Mutual, in opposing summary judgment, presented any evidence

on the duration of pregnancy-related disabilities. 372 F. Supp. at 1162. The sole evidence in the record as to why Petitioner retained either of its policies relating to pregnant women is that Petitioner acted "on advice of counsel." Deposition of Kenneth Spaulding, Manager of Personnel Services, October 17, 1972, Appendix at 36, 43.

In a unanimous decision rendered February 12, 1975, the Third Circuit affirmed the District Court judgment, holding violative of Title VII both Liberty Mutual's termination policy for women physically unable to return to work within the specified time period, and its denial of disability benefits to women disabled by pregnancy, childbirth and related conditions. In its petition to this Court, however, Liberty Mutual seeks to uphold only the exclusion of pregnancy-related disability benefits from disabled women workers.

## Summary of Argument

### I.

This case concerns the singling out of a sub-class of women workers—those disabled by pregnancy, childbirth and related conditions—for differential treatment under an otherwise comprehensive disability income protection plan. Discrimination against a sub-class of women workers, as this Court has previously held, is a *per se* sex classification prohibited by Section 703(a) of Title VII.

The purpose of Liberty Mutual's disability income protection plan is to replace a portion of the earnings lost when physical disability prevents an employee from working. Women workers disabled by pregnancy, childbirth



and related conditions have the same qualifications for these benefits as disabled men workers. They are unable to work for medically certifiable reasons, and face a loss of income, hospitalization, medical expenses and even the risk of death. The exclusion of pregnancy-related disabilities is plainly sex-based under Title VII, since it affects only women. A holding that this exclusion is not sex-based for Title VII purposes would have a devastating impact upon women in the labor force and would cast doubt upon a broad range of federal court decisions condemning other discriminatory practices against pregnant women.

### II.

The interpretative guidelines of the Equal Employment Opportunity Commission (EEOC) prohibit singling out pregnant women for disadvantageous treatment, and focus on the aspects of pregnancy which are relevant to employment decisions. Thus, they require treatment of pregnancy-related disabilities like all other temporary disabilities under disability insurance plans. These guidelines are entitled to "great deference," as six United States Courts of Appeals have held.

Congress has indicated approval of the guidelines in considering and rejecting amendments to the implementing regulations for Title IX of the Education Amendments of 1972. 20 U.S.C. §1681 *et seq.* (1974). These regulations contain provisions relating to pregnancy virtually identical to the guidelines here challenged by Petitioner. This Congressional intent is strengthened by the legislative history of Title VII, indicating determined Congressional support for ending all forms of sex discrimination in the employment sector. The mandate of the EEOC, carried out in

its guidelines, is to root out causes of systemic discrimination against all protected groups. It has done precisely that with regard to women in its sex discrimination guidelines. Thus, EEOC's identification of pregnancy classifications as *per se* sex classifications should be controlling.

## III.

If the exclusion of pregnancy-related disabilities is not assessed as a *per se* sex classification under Title VII, it is prohibited as a neutral policy with a disparate impact upon women workers, illegal under the doctrine laid down by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

## IV.

Petitioner has not presented or proved any Title VII defense to its practice of discriminating against women disabled by pregnancy, childbirth and related conditions. If Petitioner's discussion of cost is an attempt now to assert either a Section 703(e) ("BFOQ") or business necessity defense, the attempt must fail. First, it comes too late. Second, the "BFOQ" is a defense only to discrimination in "hiring and employing," not to discrimination in fringe benefit plans. Third, cost alone can never meet the standards of the business necessity defense. Finally, Petitioner's cost and statistical presentation is deficient in any case. It is not based on the company's own situation, uses inflated statistics and fails to comprehend that the guidelines allow safeguards against abuse of the plan, so long as they apply equally to all workers.



## V.

Petitioner's reliance on *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), must fail, since *Aiello* involved application of the traditional constitutional equal protection standard, not the rigorous Title VII statutory standard applicable here. Six United States Courts of Appeals as well as numerous state decisions have found *Aiello* inapposite to the question presented in this case; they have construed *Aiello* to hold that pregnancy-based classifications are sex-based under the fourteenth amendment, if accompanied by an intent to discriminate, and have recognized that Title VII, in contrast, requires no showing of discriminatory intent. In addition, under Title VII the employer has a heavy burden to justify discriminatory practices, while under the fourteenth amendment standard for social welfare programs, state legislatures are given wide leeway. Nor are constitutional standards for proscribing sex discrimination as strict as those applicable to both race and sex discrimination under Title VII. Finally, *Aiello* is inapposite here because Title VII was passed pursuant to the commerce clause and Section 5 of the fourteenth amendment, both of which permit legislation reaching well beyond the requirements of the equal protection clause.

## ARGUMENT

### I.

**Title VII of the Civil Rights Act of 1964 bars an employer from maintaining a comprehensive disability income protection plan that excludes women workers disabled by pregnancy, childbirth and related conditions.**

**A. *Denying Benefits to a Sub-Class of Disabled Women Workers—Those Workers Disabled by Pregnancy, Childbirth and Related Conditions—Constitutes a* Per Se *Sex Classification Prohibited by Section 703(a) of Title VII. To Hold Otherwise Would Reverse a Major Area of Title VII Law Now Secured by a Large Body of Well-Reasoned Decisions.***

This case concerns the singling out of a sub-class of women workers—those disabled by pregnancy, childbirth and related conditions—for differential treatment in a fringe benefit program. This Court has dealt dispositively with the legality under Section 703(a) of Title VII, 42 U.S.C. §2000e-2(a) (1974), of singling out a sub-class of women workers for differential treatment. In its first decision construing Title VII, the Court reversed a Fifth Circuit ruling that Section 703(a) allowed an employer to refuse to hire mothers of pre-school age children. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), *rev'g* 411 F. 2d 1 (5th Cir. 1969). This Court held:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children.



400 U.S. 542. Petitioner Liberty Mutual Insurance Company, in its disability income protection plan, also pursues one employment policy for women and another for men. Disabled male workers receive comprehensive coverage under the plan. Disabled female workers, however, are subject to a gaping, sex-linked, exception. This differential treatment violates the Title VII prohibition on *per se* sex classifications which the Court confirmed in *Phillips*.

Liberty Mutual seeks to avoid the application of *Phillips* to this case by describing the issue as exclusion of pregnancy, not exclusion of *disability* caused by pregnancy. Its argument centers on the *source* of disability—pregnancy, childbirth and related conditions—rather than the fact of disability, which occurs at some, normally brief, time during the course of a pregnancy. Since men never become pregnant, Liberty Mutual claims that its plan does not treat persons of "like qualifications" differently, but rather differentiates between persons of *unlike* qualifications. But the Company plan is not designed to give money to *able* workers with physical conditions, such as a weak heart, sprained ankle, or pregnancy, having no effect on their capacity to do the day's work. Instead, the plan offers income protection to *disabled* workers during the disability period, whatever the source of their disability, on a comprehensive basis. It does not generally categorize by source of disability; a broken leg may be uniquely different from a heart attack, but both disable a worker for some time, and the worker receives income protection for the time he or she is disabled. As the Employee Group Benefit Handbook proudly asserts, "When disability . . . keeps you away from work, your Income Protection plan is designed to continue a portion of your usual earnings." Petitioner's Brief, A2.

Since the focus of the plan is income protection for disability, the focus of the legal issue must be: can disabled women workers be treated differently than disabled men workers? As to the central issue of disability, women employees disabled by pregnancy and disabled men workers unquestionably have "like qualifications," *Phillips, supra,* for the benefits here in controversy. Both groups are unable to work for medically certifiable reasons, both face a loss of income, hospitalization, medical expenses and even the risk of death. Thus, under *Phillips,* Liberty Mutual's exclusion of a sub-class of disabled women workers from its disability income protection plan must be held to violate Section 703(a).

Although the exclusion does not use the term male or female, the categorization "pregnancy-related disabilities" is plainly a sex-based classification under Title VII.[2] Not only does the exclusion affect women and only women. (Indeed, pregnancy-related disabilities are the result of a physical structure and biological potential which, more than any other characteristic, define a person as a member of the female sex.) It also has a devastating impact upon women, and only women, in the labor force, precisely the ill Title VII was designed to remedy. *See Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971):

> . . . Congress intended to strike at the entire spectrum of disparate treatment affecting men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have

[2] *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), does not call for another conclusion. See Section II of this Brief, *infra.*



> plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . .

Should this Court disregard the impact of pregnancy classifications on women in the labor force and hold that Section 703(a) allows employers to single out women disabled by pregnancy and related conditions in a disability income protection plan, a major area of Title VII law would be overturned. For if classifications related to pregnancy are not sex-based classifications under Section 703(a), then employers can refuse to hire pregnant women, fire them, force them on long, unpaid leaves of absence, wipe out their accrued seniority benefits, and deny them medical insurance benefits—all based on the theory that pregnancy is unique, is not sex-based, and the employers can therefore treat pregnant women as they like. Most of these issues have already been litigated, with courts generally finding that employer policies relating to pregnant women constitute sex-based classifications in violation of Title VII. *See, e.g., Satty* v. *Nashville Gas Co.,* —— F. 2d ——, 11 FEP Cases 1 (6th Cir. 1975) (loss of job bidding seniority); *Holthaus* v. *Compton & Sons, Inc.,* 514 F. 2d 651 (8th Cir. 1975) (firing); *Communication Workers of America* v. *American Telephone & Telegraph Co.,* 513 F. 2d 1024 (2d Cir. 1975) (*Aiello, supra,* does not require dismissal of complaint alleging Title VII violations as to accrual of seniority and payments under health insurance plans); *Vineyard* v. *Hollister School District,* —— F. Supp. ——, 8 FEP Cases 1009 (N.D. Cal. 1974) (mandatory, unpaid leave; discontinuance of payments for insurance pre-

miums); *Doe* v. *Osteopathic Hospital,* —— F. Supp. ——, 3 FEP Cases 1128 (D. Kan. 1971) (firing of unwed pregnant employee). *Cf. Truitt* v. *Stromberg Carlson Corp.,* Case No. CSF-27162-72 (N.Y. State Division of Human Rights, June 26, 1975) (health insurance plan providing for lower hospital and doctor bill payments violates New York State Human Rights Law).

A decision for Petitioner in this case would cast all these decisions under a dark cloud, and would reverse the strong trend following in the wake of this Court's decision in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974). For although that case construed the due process clause, not Title VII, its practical effect was to bring to a virtual halt employers' efforts to vindicate mandatory unpaid leave policies for pregnant employees. Employers undoubtedly realized that if such a policy could not survive the due process test it was unlikely to survive the more exacting test of Section 703(a) of Title VII.[3]

Liberty Mutual itself provides a typical example of employers' reluctant but evolving adjustment to Title VII authority. It relinquished the policy of firing pregnant women in September, 1970. And perhaps with a view to the exigencies of its current position in this litigation, Liberty Mutual does not now defend, as it did in the courts below, its policy of firing women who were physically unable to return to work within three months of birth or six months of leave time (whichever came first), although no other disabled workers were subject to this drastic policy. *See Wetzel* v. *Liberty Mutual Insurance Co.,* 511 F. 2d 199, 207 (3d Cir. 1975). If Petitioner were to prevail in this case, nothing would prevent it from reverting to old ways, including its former policy of firing pregnant women.[4]

[3] Before *LaFleur* was decided, numerous cases were brought under the equal protection clause challenging mandatory leave policies, especially those of public schools. *See, e.g., Green* v. *Waterford Board of Education,* 473 F. 2d 629 (2d Cir. 1973), and the cases cited therein. These cases were not brought under Title VII because it did not cover school teachers at that time. After *LaFleur,* however, litigation on the issue virtually ceased, even under Title VII. *See Holthaus* v. *Compton & Sons, Inc., supra,* for one of the rare exceptions.



Nor would the potential impact of reversal of the judgment below necessarily be limited to pregnant women workers; it might extend to any employer decision based on the possibility that a woman might become pregnant. Most women workers can become pregnant, and this very fact influences many employer decisions. Woman's expected role as first the bearer and then the rearer of children has been the prime generator of the widespread employer discrimination against women workers that necessitated Title VII's ban on gender discrimination. Employers have refused to train women for management positions on the ground that women might become pregnant, *Hodgson* v. *Security National Bank,* 460 F. 2d 57, 62 (8th Cir. 1972); they have fired women just for getting married, *Sprogis* v. *United Air Lines, Inc., supra;* and they have refused to hire mothers of pre-school age children. *Phillips* v. *Martin Marietta Corp., supra.* Employers without a stimulus to re-examine old notions assume that women want to, or believe that women should, spend full time taking care of their children. Thus employers view these discriminatory policies as fully justified. Such customary employer be-

[4] This is so despite Petitioner's apparent concession now that both policies violate Title VII. *See* Petitioner's Brief, 21 n. 39 (referring to "maternity exclusion in a leave of absence policy" rather than to *firing* the affected employees).

liefs blind them to the reality that a large and ever-increasing percentage of women with children are employed outside the home. In fact, one-third of all mothers with pre-school age children are in the work force;[5] and as is the case with pregnant women, many of them work out of dire economic necessity.[6] The employer view that mothers and expectant mothers are not or should not be attached to the labor market and therefore may be deprived of standard employment benefits offered other workers is not only inaccurate and unfair to women workers; it can also have severe consequences on the economic well-being of women's families. This impact will be most severe on minority families, since a disproportionate number of them are headed by women.[7]

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[5] In 1974, 32.4% of mothers with children under three years old were in the work force, as were 42.3% of mothers with children aged three to five, and 53.8% of mothers with children aged six to seventeen. United States Dept. of Labor, Bureau of Labor Statistics, Summary—Special Labor Force Report, August, 1974, Marital and Family Characteristics of Workers, March, 1974. *See also* the statistics cited in *Taylor* v. *Louisiana*, 95 S. Ct. 692, 700 n. 17 (1975).

[6] Two-thirds of the 36 million women in the labor force work because of pressing economic need; either they are single, widowed, divorced or separated, or they have husbands earning less than $7,000 per year. United States Dept. of Labor, Women's Bureau, Why Women Work (Rev. ed. 1975). According to the Census Bureau, women appear to constitute the largest identifiable group of poor people in the nation. United States Bureau of the Census, Female Family Heads (Series p-23, Report #50, 1974).

[7] Among white families, 19.7% of all families are headed by a woman; among black families, 33.6% are headed by a woman. United States Comm'n on Civil Rights, Women and Poverty, 52, Table 11 (1974). Among female-headed families with children under 18 years old, 36.9% of the white families were below the low-income level, as were 60% of the black families. *Id.* at 58, Table 19.



The bind in which pregnant working women find themselves was well-described in a recent ACLU report, Hayden, Punishing Pregnancy: Discrimination in Education, Employment and Credit, Women's Rights Project, American Civil Liberties Union (October, 1973) at 43-44:

> First, a woman whose income from employment is vital to her own survival or that of her family is laid off for several months on an involuntary maternity leave. But if she looks for another job, she runs full-tilt into the wall of prejudice which decrees that pregnant women are unemployable. Then, if she turns as a last resort to unemployment benefits (to which she may have been contributing during her years as a wage earner) she is sent away because pregnancy is deemed to render her "unavailable" for employment.

This description assumes that ultimately the woman can return to her job. But employers still fire pregnant women outright. *Holthaus* v. *Compton and Sons, Inc., supra.* And even if a woman is lucky enough to retain her job, she may find that just when her expenses increase, her income decreases. She receives no disability benefits to compensate her for loss of income, and she will probably find that her health insurance covers only a fraction of her medical and hospitalization costs. Finally, she may find that she has no guarantee of returning to her former position but must take a lesser one, often at a sacrifice of all or some of her accumulated seniority.

The result of such deep and pervasive discrimination is to increase the number of women who are only marginally attached to the labor force, for women exposed to treatment which makes clear their low status in the work force some-

times fulfill the employer prophecy: they do lose interest in pursuing advancement in gainful employment because the odds against them seem overwhelming. *See generally* Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L. Forum 480 (1971); Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972). Since a woman's childbearing years are also those in the careers of working people when they most frequently are establishing themselves in the labor market, developing skills, and laying the foundation for advancement, discrimination based on the view that pregnancy and work force membership don't mix can have devastating life-long effects on working women. As the Second Circuit Court of Appeals observed in a case challenging mandatory unpaid leave for pregnant workers:

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

*Green* v. *Waterford Board of Education, supra,* 473 F. 2d at 634. A holding that an employer policy singling out pregnant women for harsh treatment does not discriminate on the basis of sex within the meaning of Section 703(a) of Title VII would assure perpetuation of such "old accepted rules and customs."

In sum, the full implications of Petitioner's argument merit this Court's close attention. In essence, a ruling for Petitioner would overturn a body of precedent that, at last, has begun to open to women genuine equality of opportunity in the labor market.



**B. *This Court Should Give "Great Deference" to the EEOC Guidelines That the Denial of Disability Benefits to Women Disabled by Pregnancy and Related Conditions Constitutes a Prohibited Sex Classification, as Has Every Court of Appeals to Consider the Issue.***

The EEOC has clearly recognized the potential impact of discriminatory treatment of pregnant women. Its guidelines, adopted after several years' experience administering the Act, take the position that classifications related to pregnancy are sex-based in violation of Section 703(a), and firmly reject Liberty Mutual's theory that since pregnancy is unique, pregnant workers may be treated as harshly as the employer wishes. Instead, the guidelines focus on those aspects of pregnancy that are relevant to employment decisions. Thus, the employer is not permitted to make decisions based solely on the state of pregnancy, but is required to consider how pregnancy affects the woman's ability to work. The healthy pregnant woman who is able to work is treated like all other healthy people and the disabled pregnant woman is treated like all other disabled people for purposes of all employment decisions.

For example, Section 1604.10(a) of the guidelines, 29 C.F.R. §1604.10(a), makes it a *prima facie* violation of Title VII to refuse to hire or to fire pregnant women:

> A written policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.

This is based on the relevant fact that pregnant women are able to work through much or most of their pregnancy. *See Cleveland Board of Education* v. *LaFleur, supra.* In this aspect of their pregnancy, they are like other *able*

workers and may not be singled out for a loss of employment opportunities.

Similarly, Section 1604.10(b) of the guidelines, 29 C.F.R. §1604.10(b), requires that *disabilities* caused by pregnancy, childbirth and related conditions be treated like all other disabilities:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

This Court has instructed that the EEOC guidelines are entitled to "great deference." *Albemarle Paper Co.* v. *Moody,* 95 S. Ct. 2362 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Phillips* v. *Martin Marietta Corp., supra,* 400 U.S. at 545 (Marshall, J. concurring). Every Court of Appeals to consider the issue presented by the instant case has followed this Court's command and applied the EEOC guidelines to find that employers may not exclude pregnancy-related disabilities from disability income protection plans. *Satty* v. *Nashville Gas Co., supra; Hutchi-*



*son* v. *Lake Oswego School District,* —— F. 2d ——, Nos. 74-3181, 3182 (9th Cir. July 21, 1975); *Gilbert* v. *General Electric Co.,* —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975); *Holthaus* v. *Compton & Sons, Inc., supra; Communication Workers of America* v. *American Telephone & Telegraph Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra.*

Petitioner argues that the EEOC's guidelines concerning pregnancy-related disability discrimination should not be accorded in this case their customary "great deference," first, because they were not issued contemporaneously with passage of the Act, and second, because they are a "dramatic reversal" of the Commission's former position on the subject. The first argument is without merit. The second is untrue.

The EEOC's interpretation of Title VII, whenever officially announced, is a statement of principles which from the outset inhere in the Act itself. The timing of the agency's interpretation is therefore of little relevance in determining the validity of that interpretation. *Bartmess* v. *Drewrys U.S.A., Inc.,* 444 F. 2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971).

In areas other than pregnancy-related disabilities, guidelines not issued contemporaneously with the effective date of the Act have been given full recognition by the courts. Indeed, in *Griggs* itself, when this Court first gave "great deference" to the EEOC guidelines, the Court noted that the EEOC has issued two sets of guidelines on testing. *Griggs, supra,* 401 U.S. at 433 n. 9. The first were titled Guidelines on Employment Testing Procedures, issued on August 24, 1966; the second, titled Guidelines on Employee

Selection Procedures and issued on August 1, 1970, 35 Fed. Reg. 12333, constituted in the Court's view an "elaboration" of the prior position. The guideline declaring that different retirement ages for men and women violate Title VII was issued in February of 1968, 33 Fed. Reg. 3344, 29 C.F.R. §1604.31(a) (now codified as 29 C.F.R. §1604.9(f)), and given great deference by the Seventh Circuit in *Bartmess* v. *Drewrys, U.S.A., Inc., supra.* It was subsequently modified on April 4, 1972 (the same day 29 C.F.R. §1604.10 issued) to provide that different retirement benefits based on sex also violated Title VII, 37 Fed. Reg. 6837, 29 C.F.R. §1604.9(f); the Third Circuit accorded this guideline great deference finding it of "no moment" that "the guideline was not promulgated until after this suit was initiated." *Rosen* v. *Public Service Electric & Gas Co.*, 477 F. 2d 90, 94 (3d Cir. 1973).

An even more important guideline, expressing the EEOC's view that state labor laws regulating women's employment (so-called "protective" legislation) conflict with Title VII's policy of nondiscrimination, was issued, "albeit after considerable hesitation," *Rosenfeld* v. *Southern Pacific Co.*, 414 F. 2d 1219, 1226 (9th Cir. 1971), in August of 1969. 34 Fed. Reg. 13367, 29 C.F.R. §1604.1(b) (now modified and codified as 29 C.F.R. §1604.2(b)). That guideline has also been accorded great deference by the courts, *see, e.g., Rosenfeld* v. *Southern Pacific Co., supra,* despite a prior contrary guideline, 30 Fed. Reg. 14927 (1965), and despite the fact that such legislation had been upheld under the fourteenth amendment by this Court. *See e.g., Muller* v. *Oregon,* 208 U.S. 412 (1908). *But see Mengelkoch* v. *Industrial Welfare Commission,* 442 F. 2d 1119 (9th Cir. 1971) (holding that a constitutional equal protection challenge to



such state labor laws presented a substantial question warranting adjudication by a three-judge district court).

Indeed, Congress itself has recognized that the process of interpretation of Title VII is necessarily an evolutionary one. The Report of the Senate Committee on Labor and Public Welfare recommending passage of amendments to strengthen Title VII enforcement summed up this perception as follows:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization . . . . Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs . . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.

S. Rep. No. 92-415, 92d Cong., 1st Sess., 5 (1971). *See also* H.R. Rep. No. 92-238, 92d Cong., 2d Sess., 8 (1971). The Report's observation is particularly relevant to the evolution that occurred concerning employer pregnancy rules, "one of the problems that . . . baffled the Commission most." Testimony of Charles T. Duncan, General Counsel of the EEOC, August, 1965, to October, 1966, Joint Appendix, Vol. III, 561, *Gilbert* v. *General Electric Co., supra.*

This period of evolution was marked by increasing consciousness of the problem of pregnancy-related sex discrimination throughout the federal government. On October 29, 1970, the Citizens' Advisory Commission on the Status of Women adopted a statement of principles substantially the same as the pregnancy guideline finally issued by the EEOC on March 30, 1972. *See* Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L. Forum 480, 481-482 n. 11 (1971). The Office of Federal Contract Compliance, the agency responsible for enforcement of Executive Order 11246, as amended by Executive Order 11375, early considered maternity issues within the coverage of the Executive Order's prohibition of sex discrimination, *see* 41 C.F.R. §60-20.3(g) (1971), but, like the EEOC, developed and refined its understanding of the phenomenon over time. *See* Proposed Sex Discrimination Guidelines, §60-20.3(h)(2), 38 Fed. Reg. 35336, 35338 (1973), a provision virtually identical to the EEOC's pregnancy guideline.

Thus the EEOC, faced with unusually difficult problems of statutory construction,

> ". . . carefully scrutinized both the employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it had become increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women." Brief of the United States Equal Employment Opportunity Commission as *amicus curiae* . . . .



*Geduldig* v. *Aiello, supra,* 417 U.S. at 502 n. 6 (dissenting opinion of Brennan, J.). It is therefore entirely proper that the EEOC withheld a formal interpretation until it had time to consider the issue fully in light of its experience under the Act.

Nor has the EEOC "dramatically reversed" its position on the issue. Throughout its Brief, Petitioner implies that the EEOC's guidelines on pregnancy-related disabilities constituted a reversal of a former set of guidelines.[8] This is simply not true. In fact, the 1972 guidelines were the first regulatory policy ever promulgated by the EEOC concerning pregnancy, and they constituted the culmination of the evolutionary process in the Commission's thinking concerning pregnancy discrimination. Before the guidelines, however, the EEOC had no stated regulatory policy on the issue and thus the guidelines reversed nothing.[9]

[8] *See* Petitioner's Brief at 4, stating that "In 1972, at a time when the Equal Employment Opportunity Commission's . . . *then-applicable guidelines permitted the exclusion of pregnancy-related disabilities from an employee disability program* . . . Wetzel and Ross . . . filed charges with the Commission . . . ." (emphasis added) (In fact, Wetzel and Ross filed charges with the EEOC on May 14, 1971; and they filed their lawsuit on February 28, 1972, more than a month before the EEOC issued 29 C.F.R. §1604.10, 37 Fed. Reg. 6837 (April 4, 1972). *See Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3644 (U.S. June 9, 1975).) Petitioner's Brief at 5, 24, 25, refers to the EEOC's "current" or "present" guidelines. And Petitioner's Brief at 25, note 48, states that, "The will of Congress, as reflected by the 1972 amendments to the Act, was, if expressed at all, to continue the Commission's *then-existing policy of sanctioning a pregnancy exclusion.*" (emphasis added)

[9] The First Annual Report cited in Petitioner's Brief at 13-14 n. 21 is not a legal interpretation of Title VII. The only authoritative interpretations of the Act are guidelines and opinion letters signed by the General Counsel on behalf of the Commission. *See* 29 C.F.R. §§1601.29, 1601.30; *Sprogis* v. *United Air Lines, Inc., supra,* 444 F. 2d at 1200-01; *Local 189, United Papermakers* v.

Although the Commission issued no guidelines on the issue until 1972, EEOC decisions began much earlier to reflect the agency's evolving realization that employer policies relating to pregnancy and childbirth discriminated against women workers. *See, e.g.,* CCH EEOC Decisions (1973) ¶6125 (June 16, 1969) (termination of an employee on the basis of pregnancy violates Title VII); CCH EEOC Decisions (1973) ¶6084 (Dec. 16, 1969) (discharge of pregnant women because of refusal to grant leave of absence for pregnancy violates the Title); CCH EEOC Decisions (1973) ¶6170 (Sept. 17, 1970) (policy of firing pregnant women in the sixth month of pregnancy violates the Title); CCH EEOC Decisions (1973) ¶6184 (Dec. 4, 1970) (termination of unmarried pregnant employees and of married pregnant employees with less than two years service, and denial of reemployment to those women given leave—married pregnant women with more than two years service—where no vacancy exists violates the Title); CCH EEOC Decisions (1973) ¶6221 (March 19, 1971) (denial of disability benefits to female employees disabled by pregnancy violates the Title). Development of the guideline itself took place for over a three year period. *See* Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260, 269 n. 54 (1972).

Thus, there was no "drastic reversal" of a former authoritative regulation on pregnancy discrimination, but rather a gradual development of understanding of the problem. The EEOC's final resolution of the issue as em-

*United States,* 416 F. 2d 980, 997 (5th Cir. 1969), ***cert. denied,*** 397 U.S. 919 (1970). Reasonable cause decisions are not entitled to deference by the courts, nor does an EEOC "no reasonable cause" decision bar a Title VII lawsuit. ***McDonnell Douglas Corp.*** v. ***Green,*** 411 U.S. 792 (1973).



bodied in the pregnancy guideline clearly enhances the purposes and policies underlying the legislation and indeed is essential if women are to gain equality in the labor market. The guideline is entitled to great deference.

### C. *Giving "Great Deference" to the EEOC Guidelines on Pregnancy-Related Disabilities Is Impelled by Congress' Action on Regulations Virtually Identical to the EEOC Guidelines and by the Legislative History of Title VII.*

There is no explicit legislative history for Title VII on the issue of pregnancy-related disabilities. However, Congress has recently directed attention to that very issue in considering and rejecting amendments to the implementing regulations for Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* (1974). These regulations, virtually identical to the EEOC position, provide:

> *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefits offered to employees by virtue of employment.

Section 86.57(c), 40 Fed. Reg. 24144 (1975).

The Title IX regulations construe broad statutory language similar in scope to Title VII.[10] They were placed

[10] Title IX provides in pertinent part:
No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

before Congress for a forty-five day period during which hearings were held and the content of the regulations thoroughly canvassed. The determination to permit the Title IX regulations to become effective without change is a plain indication that Congress intended Title VII to be interpreted in the same way. *See Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 89 (1973), in which this Court stated that Congressional action taken after Title VII was passed indicated Congress' intent in passing Title VII. The issue in *Espinoza* was whether Congress intended the Title VII term "national origin" to include the status of being an alien. The Court concluded that Congress did not so intend, in part because Congress passed laws after Title VII which barred aliens from federal employment; and Congress simply would not have taken two diametrically opposed positions—on the one hand prohibiting discrimination against aliens and on the other hand requiring such discrimination. As the Court wrote, had it ignored the second set of laws it would have been required:

> . . . to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith.

*Espinoza, supra,* 414 U.S. at 90-91. It is similarly untenable to urge that Congress intended, by its silence as to pregnancy in passing Title VII, to allow employers to deny women workers disabled by pregnancy and related conditions the fringe benefits given other disabled workers. A Congress so minded could not sanction a Title IX regula-

be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. §1681(a).



tion requiring employers to give these same women workers the same fringe benefits. Congress would not so "flout its own declaration of policy." Rather, the Title IX regulations reinforce the conclusion that the EEOC guidelines correctly interpret Congressional intent in passing Title VII.[11]

This recent indication of Congressional intent as to pregnancy-related disabilities is strengthened by specific Title VII legislative history indicating determined Congressional support for ending all forms of sex discrimination. Although the idea that sex discrimination was added to Title VII coverage only as a cynical measure by racist congressmen who wished to defeat the entire bill has been widely publicized, the legislative history of the Act clearly indicates that this was not the case. Many members of Congress were acutely aware of the severe discrimination to which women had always been subjected in the labor force and understood the implications of such discrimination for our national commerce. In particular, several Congresswomen spoke strongly and movingly on behalf of including sex discrimination in the Title, and the vote to

[11] In reasoning from the silence of Congress, and ignoring the most recent, directly relevant, Congressional action, Liberty Mutual also misconceives the test for determining when EEOC guidelines should be upheld. It suggests that *Aiello,* rather than the EEOC guidelines, should govern this case because ". . . the Act's legislative history does not disclose a congressional intent to prohibit a pregnancy exclusion." Petitioner's Brief at 11. But this Court has disregarded the EEOC guidelines only where ". . . application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." *Espinoza, supra,* 414 U.S. at 95. There is no such intent here; rather, as discussed above, the only indication is that Congress intended to prohibit the exclusion of pregnancy-related disabilities from income protection plans.

do so was taken shortly thereafter.[12] *See* 110 Cong. Rec. 2577-84 (1964), especially the remarks of Representatives Griffiths, *id.* at 2578-80, St. George, *id.* at 2580-81, May, *id.* at 2582, and Kelly, *id.* at 2582-83. Moreover, one of the nation's oldest feminist groups had actively lobbied for inclusion of sex discrimination,[13] and Congresswoman Kelly announced she supported inclusion on behalf of several national organizations which had consistently sought addition of sex to the enumerated categories in all laws forbidding discrimination. *Id.* at 2582. Finally, the Equal Pay Act of 1963 was the result of a long and thorough study of the problem of sex discrimination in wages and that legislative history forms a backdrop to the passage of Title VII.[14] In the course of the Equal Pay Act debates, Secretary of Labor Wirtz and many Senators and Representatives repeatedly stressed the second class status women occupied in the work force.[15] On signing the Act in 1963, President Kennedy explained why it was necessary:

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[12] It is also true that some men favoring the amendment opposed passage of Title VII and were not genuine supporters of women's rights, as evidenced by their jocular approach to the amendment. *See* the remarks of Representative Smith, 110 Cong. Rec. 2577 (1964). Other men, however, appeared committed to the inclusion of a prohibition against sex discrimination. *See* the exchange between Representatives Green and Huddleston, 110 Cong. Rec. 2584 (1964). Given the genuine support of many representatives, the majority vote to include sex discrimination cannot be denigrated as a "tongue-in-cheek" measure.

[13] National Woman's Party, Bulletin of Feb. 10, 1964, quoted in Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Valparaiso U.L. Rev. 326, 332-333 (1971).

[14] Margolin, Equal Pay and Equal Employment Opportunities for Women, 19 N.Y.U. Conf. on Lab. 297 (1966).

[15] 109 Cong. Rec. 2888-89 (1963); *id.* at 8916 (Senator Hart); *id.* at 9199 (Representative Green); *id.* at 9201-02 (Representative Kelly); *id.* at 9211-12 (Representative Ryan); *id.* at 9199-200 (Representative Dwyer). *See also id.* at 8914 (Senator McNamara).



> [T]he average woman worker earns only 60 percent of the average wage for men .... Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. *It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children ... and for the protection of the family unit* .... Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. *I believe they bear the heaviest burden of any group in our nation* .... (emphasis added)

XXI Cong. Q. No. 24, p. 978 (June 14, 1963), as quoted in *Phillips* v. *Martin Marietta Corp.*, 416 F. 2d 1257, 1261 n. 15 (5th Cir. 1969) (dissenting opinion of Brown, C.J.).

Whatever ambiguity might be thought to exist with regard to the passage of Title VII in 1964, there can be no doubt about the intent of Congress in 1972, when it passed an amendment to Title VII, the Equal Employment Opportunity Act. In explaining why the amendment was needed, the House Committee on Education and Labor wrote:

> The situation of the working women is no less serious [than that of minorities]. Women currently comprise approximately 38% of the total work force of the Nation. There are approximately 30 million employed women.
>
> Recent statistics released from the U.S. Department of Labor indicate that there exists a profound eco-

nomic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968, women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more.

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.

In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.

This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of pro-



> hibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 4-5 (1971). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess., 7-8 (1971).

There can be no doubt that Congress viewed all forms of employment discrimination against women with the utmost seriousness. Congress did, of course, leave it to the EEOC to articulate with more specificity which practices were illegal, and this is what the Commission has done—especially as to pregnancy-related discrimination, one of the areas in which the Commission "progressively involved itself." The legislative history thus fully supports the position that the EEOC guidelines on pregnancy-related disabilities are entitled to "great deference." [16]

**D. *Petitioner's Exclusion of Pregnancy-Related Disabilities From Its Disability Income Protection Plan, Even If Not Assessed as a* Per Se *Sex Classification, Would Be Prohibited Under Section 703(a) as a Neutral Policy With a Disparate Impact on Women Workers.***

In *Griggs* v. *Duke Power Co., supra,* this Court held that an employer policy, neutral on its face, which has a disparate impact on a protected class violates Title VII unless justified by business necessity.[17] The testing and

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[16] The legislative history of the Equal Rights Amendment is in accord, despite Petitioner's assertion to the contrary in its Brief at 11-12. *See* Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L. J. 871, 929-932 (1971); this article was the "primary legislative history" of the amendment. 118 Cong. Rec. S9097 (1972).

[17] For applications of the doctrine to women workers, *see Rose* v. *Bridgeport Brass Co.*, 487 F. 2d 804 (7th Cir. 1973) (disparate impact of job reclassification system); *Meadows* v. *Ford Motor*

diploma requirements at issue in *Griggs,* although they affected some whites, were illegal because they fell most heavily on blacks. While Petitioner's exclusion of pregnancy-related disabilities from its disability plan is not a classic example of such a neutral policy, in that it can apply only to women workers and affects no men workers, it is a neutrally-worded policy containing no explicit reference to women or men. Thus, if this Court holds that the exclusion is not an explicit *per se* sex classification, it must conclude that the exclusion is a neutral policy having a disparate impact on women workers. No statistics need be cited to prove its disparate impact, since only women are affected by the policy.

Petitioner attempts to conceal this impact by contending that "Female Liberty employees do not receive less benefits or aggregate risk coverage under the income protection plan than do their male counterparts. In fact, under plans such as Liberty's, females receive a disproportionately high percentage of benefits. . . ." Petitioner's Brief at 6. Liberty Mutual presented no evidence below for this proposition. More important, Respondents Wetzel and Ross have not challenged the effect of the overall benefit plan, but only that of the exclusion. Analysis of discriminatory impact must therefore focus on the effect of the exclusion, not the effect of the whole plan. In a similar

*Co.*, 62 F.R.D. 98, 101 (W.D. Ky. 1973) (disparate impact of minimum weight requirement), ***modified and aff'd on other grounds,*** 510 F. 2d 939 (6th Cir. 1975); *Danner* v. *Phillips Petroleum Co.*, 447 F. 2d 159 (5th Cir. 1971) (disparate impact of granting seniority and bumping rights only to holders of unionized jobs); *cf. Andrews* v. *Drew Municipal Separate School Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973) (disparate impact of refusal to employ parents of illegitimate children), ***aff'd on other grounds,*** 507 F. 2d 611 (5th Cir. 1975).



situation, for example, this Court would not uphold the exclusion of disabilities caused by sickle-cell anemia because blacks receive "a disproportionately high percentage of benefits;" the only question would be whether the exclusion itself was discriminatory. *See Griggs, supra,* 401 U.S. at 430 n. 6, where this Court examined statistics showing the impact on blacks of the testing and diploma requirements, and did not even consider statistics showing the company's overall employment of blacks.[18]

### E. *Liberty Mutual Has Not Asserted or Proved a Defense to Its Violation of Section 703(a).*

Both the District Court and the Court of Appeals found that Liberty Mutual failed to assert at trial or on its motion for reconsideration any affirmative defense or even to allege evidentiary facts in support of a defense. 511 F. 2d at 208; 372 F. Supp. at 1164. Indeed, on its motion for reconsideration Liberty Mutual argued that it was impossible to present any statistical evidence on the cost of extending disability benefits to women disabled by pregnancy and related conditions because no statistics were available.

Nevertheless, in its brief before this Court, Liberty Mutual has argued, albeit to show that the exclusion was not "invidious," that it excluded pregnancy-related disabilities "because such coverage is 'extraordinarily expensive.' . . ." Petitioner's Brief, 16. A cost argument is

[18] *And cf. Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). The Court there dealt with an explicit sex classification, not a neutral policy disparately affecting women, but it is significant that the Court, as in *Griggs,* examined only the exclusion, not the employer's overall employment of women, which was excellent (*see Phillips* v. *Martin Marietta Corp.*, 411 F. 2d 1, 2 (5th Cir. 1969), *rev'd Phillips, supra,* pointing out that 75 to 80 percent of the persons holding the position at issue were women).

irrelevant to the finding whether discrimination prohibited by Section 703(a) of Title VII has occurred (as opposed to whether a defense to such discrimination exists). The only intelligible possibility is that Liberty Mutual is attempting now to assert either a Section 703(e) ("BFOQ") or a business necessity defense. If that is the purpose of Petitioner's cost discussion, the attempt must fail. A defense interposed at this stage of the litigation surely comes too late, especially when it is unsupported by any record evidence about the operation of Liberty Mutual's plan. Moreover, neither Section 703(e) nor the business necessity standard allows the cost argument introduced by Petitioner.

Under Title VII, the only statutory defense to an explicit sex classification prohibited by Section 703(a) is that provided by Section 703(e), 42 U.S.C. §2000e-2(e) (1974):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

However, this Section cannot provide a cost defense in a case challenging discrimination in the provision of fringe benefits, for the "BFOQ" defense allows discrimination only in "hiring and employing."[19] Since Liberty Mutual

[19] Section 703(e) is considerably narrower in coverage than is Section 703(a), which prohibits discrimination in refusals to hire, discharge, compensation, terms, conditions or privileges of employment, as well as any limitation, segregation, or classification which deprives any person of employment opportunities or adversely affects his or her status.

In contrast, Section 703(e) relates exclusively to "hiring and employing." Title VII cases construing the "BFOQ" provision have generally dealt with employer policies excluding persons of one sex from a job opportunity, and not with discrimination in the "compensation, terms, conditions, or privileges of employment." *See, e.g., Sprogis* v. *United Air Lines, Inc., supra; Rosenfeld* v. *Southern Pacific Co., supra; Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (5th Cir. 1969) (all dealing with job opportunities and construing the "BFOQ"). *Compare, e.g., Hutchison* v. *Lake Oswego School Dist., supra; Communication Workers of America* v. *American Tel & Tel. Co., supra; Manhart* v. *City of Los Angeles*, —— F. Supp. ——, 10 FEP Cases 101 (C.D. Cal. 1975) (all dealing with discrimination in fringe benefit plans, that is, "compensation, terms, conditions, or privileges of employment," without discussing the "BFOQ").



is not discriminating in "hiring and employing" (the Section 703(e) standard) by excluding pregnancy-related disabilities from its disability plan, but rather is discriminating as to "compensation, terms, conditions, or privileges of employment" (part of the Section 703(a) standard), Section 703(e) simply does not apply. Consequently, Petitioner's cost argument cannot be pegged to the sole statutory defense to proscribed discrimination.[20]

[20] The EEOC guidelines explicitly recognize this by totally prohibiting all differential treatment of pregnancy-related disabilities in various fringe benefit plans, 29 C.F.R. §1604.10(b), and providing further that: "It shall not be a defense under Title VII to a charge of sex discrimination in *benefits* that the cost of such benefits is greater with respect to one sex than the other. (emphasis added) 29 C.F.R. §1604.9(e). The guidelines dealing with *hiring and employing* pregnant women, on the other hand, make the exclusion of such women from employment only a *prima facie* violation of Title VII. 29 C.F.R. §1604.10(a). A "BFOQ" defense may be asserted as to these practices, although "BFOQ" has been so narrowly defined by the courts that the defense is almost never successful. *See, e.g., Rosenfeld* v. *Southern Pacific Co., supra,* 444 F. 2d at 1225 (". . . sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception . . . . Equality of footing is established only if employees

The only remaining defense to a violation of Section 703(a) is the judicially created business necessity defense —a defense which is asserted against a neutral rule with a discriminatory impact on a protected class. But cost alone has never been found to meet the strict standards of business necessity. *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971), is illustrative. In that case, the court reviewed the accumulated authority on the business necessity standard and concluded:

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. *Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with lesser differential racial impact.* (emphasis added)

444 F. 2d at 798. The court then applied this test to the Lorillard Corporation's business necessity arguments in favor of retaining a discriminatory departmental seniority

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otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity."); *see also Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co., supra.*



system. Lorillard first asserted that its system was inherited from a prior plant and was like those used by other companies. This justification, the court declared, was not sufficiently compelling, given the system's discriminatory impact: "[N]either maintenance of the status quo nor conformance to precedent is a legitimate business purpose that will vindicate an otherwise unlawful practice." 444 F. 2d at 799. Liberty Mutual's similar argument that "pregnancy has been historically differentiated in disability income plans," Petitioner's Brief at 18, should fare no better. Title VII was passed precisely because many discriminatory practices were embedded in employment practices nationwide, and Congress intended that this should cease.[21]

Lorillard next argued that it used the discriminatory system at issue to avoid union pressure and the economic costs a strike might impose. Again the court rejected this purpose as not sufficiently compelling to override the discrimination. It noted:

> While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative. For example, although there undoubtedly are significant costs involved in validating tests, *Griggs* requires that employment tests be abandoned if not specifically validated as job-rated. Analogous is Diaz v. Pan American World Airways, 442 F. 2d 385 (5th Cir. 1971), where the court explicitly held that mere customer preference would not justify continuation of a discriminatory hiring policy, even in the context of a

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[21] *Smith* v. *Troyan*, —— F. 2d ——, 10 FEP Cases 1380 (6th Cir. 1975), cited in Petitioner's Brief at 18 n. 29, is not *contra* because, among other reasons, it arose under the fourteenth amendment, not Title VII.

> sex discrimination case which, unlike race cases, is subject to a "bona fide occupational qualification" exception.

444 F. 2d at 799, n. 8. As to the increased administrative costs Lorillard would encounter, the court commented:

> [W]e have already noted that avoidance of the expense of changing employment practices is not a business purpose that will validate the racially differential effects of an otherwise unlawful employment practice.

444 F. 2d at 800. *See also United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971); *Johnson* v. *Pike Corp. of America*, 332 F. Supp. 490, 495 (C.D. Cal. 1971).

Thus, Liberty Mutual's alleged cost-saving purpose is not sufficiently compelling to override the plan's discriminatory impact. Nor has Liberty Mutual made any showing[22] that there are no alternative policies which would save costs with a lesser differential impact on women. As the *Robinson* court remarked:

> It should go without saying that a practice is hardly "necessary" if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory.

444 F. 2d at 798, n. 7. *Accord, United States* v. *Bethlehem Steel Corp., supra,* 446 F. 2d at 662. Obvious alternatives are available to Liberty Mutual if cost saving with less discrimination is its objective.[23] They include establishing a longer period prior to commencement of coverage for all workers and limiting coverage to a shorter number of weeks.

[22] Liberty Mutual has the burden of proof on the issue of business necessity. *Griggs, supra,* 401 U.S. at 432.



Finally, Liberty Mutual's cost and statistical presentation is notably deficient in a variety of respects. Liberty Mutual now cites statistics on cost from other companies' experience. As in the proceedings below, it remains silent on its own situation. Perhaps this is because it has no reliable statistics on the length of time of the actual disability caused by childbirth and pregnancy complications, having until so recently fired women who become pregnant. The statistics it does tender are speculative and are entitled to no weight in determining the legality of Liberty Mutual's plan. They were not subjected to adversarial scrutiny in this case and are not based on the period of time women are physically disabled from working, the only time during which benefits are payable under the EEOC guidelines. *See,* for example, Petitioner's Brief at 17-18, citing cost estimates by American Telephone and Telegraph Company based on an assumed maternity leave (rather than a period of pregnancy-related disability) of five and one-half months, when the average period of *disability* is only six to eight weeks. *See* Policy Statement on Pregnancy-Related Disabilities, American College of Obstetricians and Gynecologists, quoted in *Aiello, supra,* 417 U.S. at 501 n. 4 (dissenting opinion of Brennan, J.). Similarly, the cost experience of New Jersey and Rhode Island, Petitioner's Brief at 17, is not relevant. In Rhode Island no proof of actual disability was required for a woman to collect benefits. Rather,

[23] The only evidence in the record as to Liberty Mutual's purpose in excluding pregnancy-related disabilities is that it did so "on advice of counsel." *See supra* at 8.

women were permitted to take the maximum allowable time off from their jobs whether or not they were in fact capable of working. Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y. L. Forum 480, 484-485 (1971). The cited New Jersey experience misleadingly refers to only one of three separate New Jersey funds, the "disability during unemployment" fund, which accounts for only 10% of total New Jersey benefits but 74% of the disabilities due to childbirth. Supplemental Brief of Appellees, 3-5, *Aiello, supra. See also* Koontz, *supra,* at 486.

Another defect in the cited statistics is that they are apparently based on the percentage increase in the cost of the benefit program. So stated, these figures sound ominously large; but stated in terms of the percentage increase in *employee* costs, they may be insignificant. A report on discrimination related to pregnancy found, for example:

> In Wisconsin, where in 1971, 46.46% of 45,000 employees of the state government were women, it was calculated that out of each $100 that the state incurred in employee costs, 7¢ would be for temporary disability premiums attributable to pregnancy. True, this 7¢ represented a 30% increase over income continuation premiums excluding pregnancy (22¢), but only .07% of each $100 in employee costs. Thus, when private employers cried that to follow suit would raise their costs by 30%, what they actually meant is that their premiums would rise by 30%, still a negligible fraction of their real employee costs . . . .
>
> The Citizen's Advisory Council on the Status of Women, a body of private citizens whose members are appointed by the President, estimates that the cost to employers of including claims arising from pregnancy under existing temporary disability insurance would be a 10% increase in premiums for a six-week benefit. Consider this figure against the fact that the total cost of *all* health, disability, life and accident insurance premiums is 5.5% of the total wage and salary cost in private industry. The Council stresses that the cost of covering pregnancy-related disability can be held down only if there are no artificial pressures or requirements forcing women to stay off the job longer than necessary. (citations omitted)



Hayden, Punishing Pregnancy: Discrimination in Education, Employment, and Credit, Women's Rights Project, American Civil Liberties Union (October, 1973) at 49-50.

Liberty Mutual also assumes that costs will be enormous because pregnant women will absent themselves from work for a time period "which is substantially longer than any actual inability to work, and is significantly influenced by concern for the welfare of the child in addition to that of the mother." Petitioner's Brief at 19. As the District Court pointed out, however, Liberty Mutual can medically ascertain the actual period of disability, as is done in this country and abroad "in hundreds, if not thousands, of cases daily." 372 F. Supp. at 1164. Moreover, it can certainly require that doctors certify that *any* person receiving disability payments was actually disabled for the entire time of the payment. But it cannot assume that pregnant women (and their doctors) will be especially prone to lie about the period of disability.[24] Nor can it be assumed that a woman

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[24] The District Court commented on this point:

> . . . as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip-lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic.

372 F. Supp. at 1164.

who has given birth will choose to stay home out of concern for her child's welfare; many women will find their salaries are necessary in order adequately to feed, clothe and house their children,[25] especially when family expenses increase due to the birth of another child. As for the concern that pregnant women will leave the work force, Petitioner's Brief at 18-19, Liberty Mutual can require that any person receiving disability benefits return to work after the period of disability or forfeit the payments. The guidelines demand only that such a requirement be applied equally to all workers.

In conclusion, the factors cited by Liberty Mutual as driving up the costs of a disability plan which covers pregnancy-related disabilities[26] are unsupported by any

[25] Two-thirds of the thirty-six million women in the labor force work because of pressing economic need; either they are unmarried or have husbands who earn less than $7,000 per year. United States Dept. of Labor, Women's Bureau, Why Women Work (Rev. ed. 1975).

[26] It also asserts that pregnancy is voluntary, but this has no necessary effect on cost, and in any event the plan does not exclude other disabilities caused by voluntary activity, such as cancer and other ailments due to smoking. Nor did Liberty Mutual offer any proof that pregnancy has a frequency rate "which dwarfs covered conditions." Petitioner's Brief at 19. In contrast to Petitioner's speculation, national statistics indicate that men and women lose approximately the same average number of disability days of work per year, even including days lost due to pregnancy-related disabilities. *See* United States Dept. of Health, Education and Welfare, Public Health Service, Current Estimates From The Health Interview Survey, United States—1968 (Vital and Health Stats. Series 10, No. 60), Table 8 at 12, Table 16 at 20 (on a per person, per year basis, men lost 3.5 work days and women 4.4 days for disabilities caused by acute conditions, Table 8; total work-loss days were 5.2 per man and 5.9 per woman, Table 16). Moreover, Petitioner's expressed concern about the frequency of birth appears less relevant to women in the labor market than to those who remain outside it. *See* Reports of the Advisory Council on Social



evidence in this case, and are based on inflated statistics and an apparent failure to comprehend that the EEOC guidelines allow the imposition of safeguards against abuse of the program, so long as they apply equally to all workers. The company's belated assertion of a "cost defense" thus has no merit.

## II.

**The rigorous standard of Title VII, not the traditional constitutional standard applied in *Geduldig* v. *Aiello*, is controlling in this case.**

### A. *Six United States Courts of Appeals and an Array of State Authorities, Distinguishing Legislative Anti-Discrimination Requirements From Fourteenth Amendment Limitations, Have Declared* Aiello *Inapposite to the Issue Here in Controversy.*

In *Geduldig* v. *Aiello, supra,* this Court held that the equal protection clause does not require inclusion of pregnancy-related disabilities in a state-run social welfare program. Petitioner argues that *Aiello, sub silentio,* foreclosed the Title VII issue presented here and discarded, without even mentioning it, the EEOC guideline directly in point. This bold position stands in glaring contrast to the well-reasoned opinions of six United States Courts of Appeals, including the Second, Third, Fourth, Sixth, Eighth and Ninth. *Satty* v. *Nashville Gas Co., supra; Hutchison* v. *Lake Oswego School District, supra; Gilbert* v. *General Electric Co., supra; Holthaus* v. *Compton & Sons, Inc., supra* (decided after *Aiello* but not explicitly discussing *Aiello*);

Security at 177 (1975) (in the United States as in all industrial societies the greater the percentage of women working the lower the birth rate).

*Communication Workers of America* v. *American Telephone & Telegraph Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra.* These courts have distinguished the *Aiello* fourteenth amendment analysis from the more rigorous, effect-oriented analysis required under Title VII. In *Aiello,* this Court held that the legislative action before it was rational and therefore did not invidiously discriminate when measured by the traditional constitutional standard. The Court plainly did not rule, as Petitioner argues, Petitioner's Brief at 9, that pregnancy classifications are never sex-based. Rather, it indicated that legislative action concerning pregnancy would be vulnerable to challenge under the equal protection clause as impermissible sex classification, if accompanied by an intent to discriminate. 417 U.S. at 496 n. 20. Since Title VII never requires a showing of intent to discriminate, *Griggs, supra,* the identification in *Aiello* of intent as a factor critical under constitutional analysis is simply inapposite to this case. Further, while *Aiello* concerned classifications a legislature might draw, the case at bar concerns a sweeping legislative proscription restricting classifications employers may draw. Moreover, the Court's very silence as to the EEOC guidelines, of which it was well aware, *see Cleveland Board of Education* v. *LaFleur, supra,* 414 U.S. at 638 n. 8, is persuasive that the constitutional adjudication in *Aiello* did not foreclose the issue of what Congress intended to accomplish through Title VII. *See Tyler* v. *Vickery,* 517 F. 2d 1089, 1097-99 (5th Cir. 1975).

Several states have also concluded that *Aiello* is irrelevant in determining whether pregnancy classifications are sex-based for purposes of state fair employment practice laws. Thus, in *Union Free School District No. 6* v. *New*



*York State Human Rights Appeal Board,* 35 N.Y. 2d 371, 320 N.E. 2d 859, 362 N.Y.S. 2d 139 (1974), New York's highest court held invalid under the state's analogue to Title VII an employer's discriminatory leave policy and denial of fringe benefits for pregnancy-related disabilities.[27] The court reasoned:

> The legal issue in *Aiello,* however, was quite different from that which we confronted [in previous cases]. In *Aiello* the court concluded that the Equal Protection Clause of the Federal Constitution did not preclude a State Legislature from adopting the pregnancy-childbirth classification which was "rationally supportable" in a social welfare program. Thus, a sex-based classification was held to be constitutionally permissible in the context of the California insurance program.
>
> A quite different question was put to us. New York had adopted a statute expressly forbidding discrimination based on sex, a classification which while not foreclosed by constitutional prohibition could be proscribed by legislative enactment. The question we faced then was whether the personnel policies and practices in the cases before us transgressed our statutory proscription. That they might not be constitutionally forbidden was irrelevant.

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[27] *See also Board of Education, East Williston* v. *Division of Human Rights,* 35 N.Y. 2d 673, 319 N.E. 2d 202, 345 N.Y.S. 2d 93 (1974) (singling out pregnancy for special disadvantageous leave treatment is illegal) and *Board of Education, City of New York* v. *Division of Human Rights,* 35 N.Y. 2d 675, 319 N.E. 2d 203, 360 N.Y.S. 2d 887 (1974) (teacher on a pregnancy-related leave may use sick and sabbatical leave entitlements to same extent as she would be permitted to use them for other temporary disabilities), described and cited with approval in *Union Free School Dist. No. 6, supra.* 35 N.Y. 2d at 376, 320 N.E. 2d at 861, 362 N.Y.S. 2d at 141.

35 N.Y. 2d at 376, 320 N.E. 2d at 860, 362 N.Y.S. 2d at 141-2.

On the same basis, the New York State Human Rights Appeal Board, in *Armbruster* v. *Crouse-Irving Memorial Hospital,* Case No. CS-28495-72, App. No. 2104 (1975) (unpublished), *appeal pending,* N.Y. App. Div., declared illegal under state law the exclusion of pregnancy-related disabilities from a private employer's disability income protection plan. Similar decisions applying state laws comparable to Title VII have been reached in Illinois, Wisconsin, and Maryland. *In re Josephine Frigale,* 2 CCH E.P.G. ¶5212 (Ill. Fair Employment Practices Comm'n, Jan. 16, 1973); *Reidel* v. *Wisconsin Dept. of Employe* [*sic*] *Trust Funds,* 2 CCH E.P.G. ¶5211 (Wisc. Dept. Hum. Rel., Jan. 2, 1974); Section 8(b), Maryland Sex Discrimination Guidelines, 3 CCH E.P.G. ¶23,820.08 (1972).

Title VII and state fair employment laws share a common purpose: to root out policies and practices that artificially hinder the fair integration into the work force of women and other protected groups. Just as state courts have looked to federal Title VII precedent in defining the range of statutory anti-discrimination commands, so this Court has found state interpretations of fair employment practice laws helpful in construing Title VII. *See Espinoza* v. *Farah Manufacturing Co., supra,* 414 U.S. at 88 n. 2.

In sum, *Aiello* called for this Court's judgment as to constitutional limitations on legislative classification. The instant case, by contrast, requires construction of a legislative measure broadly designed to eradicate from the nation's commerce the strains of discrimination that have blighted our history.



**B. *The Constitutional Equal Protection Standard Applied to Social Welfare Programs Has No Bearing on Title VII Analysis.***

The holding in *Aiello* is entirely consistent with this Court's well-established precedent regarding the wide leeway available to the legislature in designing welfare programs to deal with myriad social programs. Classifications in social welfare measures, if rationally supportable, have generally withstood challenge under the equal protection clause. *Weinberger* v. *Salfi,* 95 S. Ct. 2457 (1975); *Kahn* v. *Shevin,* 416 U.S. 351, 355-56 (1974); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972); *Dandridge* v. *Williams,* 397 U.S. 471, 486-87 (1970). In contrast to equal protection analysis, the "rationally supportable" criterion has no place in Title VII analysis of an employer's business practice shown to be discriminatory on its face or to impact adversely on a protected class. Rather, as discussed *supra* at 38-43, a heavy burden is placed on the employer to prove that the practice is justified, either as a "BFOQ" in the case of *per se* "hiring and employing" discrimination, *Rosenfeld* v. *Southern Pacific Co., supra; Bowe* v. *Colgate Palmolive Co., supra; Diaz* v. *Pan American World Airways, Inc., supra,* or by a compelling business necessity in the case of a neutral policy having a discriminatory impact. *See Griggs* v. *Duke Power Co., supra; Robinson* v. *Lorillard Corp., supra; United States* v. *Bethlehem Steel Corp., supra; Danner* v. *Phillips Petroleum Co., supra.* Petitioner has not attempted to raise the "BFOQ" as a defense. Nor has it shown any business necessity, compelling or otherwise, for the exclusion. See *supra* at 37-47. In this context, it is meaningless for Liberty Mutual to attempt to show that the exclusion meets the "rationally supportable" standard of review for social welfare programs. That is simply no defense to a Title VII lawsuit.

### C. *The Standard of Review in Equal Protection Sex Discrimination Cases Is Less Stringent Than the Standard Applicable Under Title VII to Both Race and Sex Discrimination.*

Petitioner argues that *Aiello* should control this case because the standards of discrimination under the fourteenth amendment and Title VII are equally strong and it would be anomalous to have it otherwise. Petitioner's Brief at 9-11. Even as to race discrimination the statutory command has been distinguished from the constitutional limitation. *See Tyler* v. *Vickery, supra.* For sex discrimination the constitutional and statutory standards are markedly different in a number of respects. For example, under the fourteenth amendment, *per se* sex classifications are permissible in certain circumstances. *Kahn* v. *Shevin, supra; Schlesinger* v. *Ballard,* 95 S. Ct. 572 (1975). Under Section 703(a) of Title VII, however, *per se* classifications are flatly prohibited.

A further, conspicuous, illustration is the different treatment state laws regulating women's employment, so-called "protective" labor laws, have received under the fourteenth amendment and Title VII. Under the fourteenth amendment, these laws have been upheld routinely: *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937); *Radice* v. *New York,* 264 U.S. 292 (1924); *Muller* v. *Oregon, supra. But cf. Mengelkoch* v. *Industrial Welfare Commission, supra; McCrimmon* v. *Daley,* 418 F. 2d 366 (7th Cir. 1969); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971). Under Title VII, however, they have been struck down in countless lawsuits brought by women workers barred from employment opportunities by these "protections." *See, e.g., Rosenfeld* v. *Southern Pacific Co., supra; Garneau* v. *Raytheon Co.,* 323 F. Supp. 391 (D. Mass. 1971); *Richards* v. *Griffith Rubber Mills,* 300 F. Supp. 338 (D. Ore. 1969).[28]



In sum, despite significant development of the equal protection principle to prohibit certain gender-based inequalities in law, it is clear that sex discrimination is not yet subject to the same constitutional strictures as is race discrimination. In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), only four members of the Court endorsed an equal protection/strict scrutiny test for sex discrimination cases. But Title VII, unlike the fourteenth amendment, does not carry a less stringent test for sex discrimination than for race discrimination. Rather, it makes race and sex discrimination in employment equally unlawful; thus, Section 703(a)-(d) provides only one definition of unlawful employment practices.[29] Courts have explicitly recognized that eradication of both forms of discrimination was the legislative objective. *See, e.g., United States* v. *Georgia Power Co.,* 474 F. 2d 906, 921 (5th Cir. 1973) ("Title VII was enacted with the legislative objective of disestablishing the racial and sexual caste systems which had remained ingrained in the American economy since slavery and coverture."); *Rosen* v. *Public Service Electric & Gas Co.,* 409 F. 2d 775, 781 (3d Cir. 1969) ("We do not make the

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[28] For a comprehensive list of such decisions and an account of the virtual disappearance of such laws, *see* Note: Impact of Rosenfeld and of the EEOC Regulations, in Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law: Causes and Remedies, 269-72 (1975).

[29] Section 703(e) does provide a "BFOQ" defense to "hiring and employing" discrimination based on religion, sex, or national origin, not available against such discrimination based on race or color, but as noted *supra* at 39-40 n. 20, the courts and the EEOC have construed the section extremely narrowly.

distinction . . . that discrimination on account of sex is any less reprehensible or any less protected than discrimination because of race."); *Local 186, Pulp Workers* v. *Minnesota Mining & Manufacturing Co.,* 304 F. Supp. 1284, 1287, 1289 (N.D. Ind. 1969) ("The court . . . does not and will not draw any legal distinctions between the seriousness and gravamen of acts and policies of sexual discrimination alleged herein and the more frequently litigated acts of racial discrimination . . . [T]his court cannot conclude that under the allegations herein presented, sexual discrimination differs in any significant way from racial discrimination as a form of class discrimination."). Congress expressed the same view when it enacted the Equal Employment Opportunity Act of 1972, 86 Stat. 103:

> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. (citations omitted)

H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 5 (1971). *Accord*: S. Rep. No. 92-415, 92d Cong., 1st Sess., 7-8 (1971). Thus, this Court's *Aiello* holding that a legislature's pregnancy classification did not constitute a sex-based classification under the equal protection clause, absent discriminatory intent, has no bearing on the Title VII determination that a pregnancy classification is sex-based.



### D. *Legislation Enacted Pursuant to the Commerce Clause or Section Five of the Fourteenth Amendment May Reach Further Than Practices Prohibited by the Equal Protection Clause.*

The basis for congressional authority to enact Title VII was the commerce clause, the source of other sweeping legislation designed to regulate employment relationships and eradicate congressionally perceived discrimination. *See* 110 Cong. Rec. 1528, 7202-12, 8452-56. In *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), for example, which upheld Congress' power to regulate employer-employee relations affecting commerce under the National Labor Relations Act, the Court declared:

> The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection or advancement" [citation omitted]; to adopt measures "to promote its growth and insure its safety" [citation omitted]; "to foster, protect, control, and restrain." [citation omitted] That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."

*Id.* at 36-37. *See also United States* v. *Darby,* 312 U.S. 100, 115 (1941) (upholding Fair Labor Standards Act); *NLRB* v. *Fainblatt,* 306 U.S. 601, 604 (1939). Similarly, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964), upheld congressional power under the commerce clause to outlaw race discrimination in public accommodations through Title II of the 1964 Civil Rights Act. *See also Katzenbach* v. *McClung,* 379 U.S. 294, 303-304 (1964).

As the Court of Appeals for the Second Circuit declared in *Communication Workers of America* v. *American Telephone & Telegraph Co., supra*:

> Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce. [citation omitted]
>
> Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.

513 F. 2d at 1031. *Accord, Satty* v. *Nashville Gas Co., supra.* In a footnote, the court added:

> This [the Commerce Clause power] is in addition to the Congressional power under Section 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the dictates of the Equal Protection Clause. That power may reach more broadly than the Equal Protection Clause itself. See *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *United States* v. *Guest,* 383 U.S. 745, 781-784 (1966) (Brennan, J., concurring and dissenting). See also *Vineyard* v. *Hollister Elementary School District,* 64 F.R.D. 580, 585 (N.D. Cal. 1974).

513 F. 2d at 1031 n. 12.



In conclusion, Liberty Mutual's facile question of Title VII and the fourteenth amendment is unsupported by precedent and flouts Congressional policy. The equation has been rejected in an array of recent decisions. The Court is not confronted in this case, as it was in *Aiello,* with the minimum commands of the equal protection principle. Instead, it has before it the grand design of Congress to eliminate job market conduct that has so long confined women's opportunities and denied them a fair chance to participate fully in the nation's commerce. EEOC's guidelines, while inapposite in *Aiello,* are here entitled to the great deference accorded them by the court below and in all reasoned decisions addressed to the issue now in controversy.

## CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Third Circuit should be affirmed, and Liberty Mutual's denial of disability income protection benefits to women disabled by pregnancy and related conditions should be declared violative of Title VII of the 1964 Civil Rights Act.

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